PERBADANAN PEMBANGUNAN BANDAR

v.

SYABAS HOLDINGS SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[DISTRESS SUIT NO. 35-6-89]
23 AUGUST 1989

CIVIL PROCEDURE: *Application for writ of distress for recovery of rentals - Application by claimants for injunction to restrain execution - Leave under s. 10(1) of the Distress Act 1951 - Rights of claimant - Principles applicable - "Reputed ownership" - Section 12(a) of the Distress Act - Right of debenture holders - Priority over claimants.*

The plaintiff applied for a writ of distress against the defendant for the recovery of rents due. Subsequently, several claimants applied, *inter alia*, for an injunction to restrain the plaintiff from taking any further steps in the execution of the writ of distress.

Held:

[1] Before the right to distrain, for rent upon a demise may arise, under the common law, the relation of landlord and tenant must exist. There must be a demise recognised by law or equity.

[2] The onus of proof of title is on the execution creditor or as in this case the landlord. Here the plaintiff has failed to do so.

[3] Park East Holdings have no beneficial interest in the tenancy of the demised premises. They do not even have any equitable right or interest in the tenancy.

[4] The 1st claimant is a stranger *vis-a-vis* the distress proceedings therefore the provisions of s. 12(a) of the Distress Act 1951 do not have any relevance.

[5] The debenture holders, Bolton Finance Bhd., take priority over the claimants, since the floating charge, given under the debenture in question, has crystallized before the execution of the writ of distress was completed.

Cases referred to:
Tynte v. Buller [1854] 23 LJ Ch 504
Walsh v. Longsdale [1882] 21 Ch D 9
Lyons v. Elliot [1876] 32 Cl D 437
Gilman v. Elton [1821] 129 ER CP 1211
Fowkes v. Joyce Vol. 23 ER Ch 692
Cresswell v. Jefferey [1912] 28 TLR 413
Clarke v. Millwall Dock Co. [1886] 17 QBD 94
Baird v. Wells [1890] 44 Ch D 661
Solomon v. Solomon & Co. [1895-1899] All ER
Taunton v. Sheriff of Warwikleshire [1895] 2 Ch 319
Haw Par Bro. International v. Oversea Textiles Co. Ltd. [1978] 2 MLJ 19

Legislation referred to:
Distress Act 1951, ss. 10(1), (1)(a), 12(a), 14

Other source referred to:
Mallal's Supreme Court Practice by Tan Sri Chang Min Tat at p. 173

For the respondent - Syed Ahmad Helmy; M/s. Yahya, Helmi & Co.
For the receivers - Timothy Oii
For the Park East Holdings - Eugene Tan; M/s. David Lingam & Co.

JUDGMENT

Lim Beng Choon J:

On 4 May 1989, Perbadanan Pembangunan Bandar ("UDA"), the plaintiff, applied for a writ of distress against Syabas Holdings Sdn. Bhd., ("Syabas"), the defendant, for the recovery of rents due in respect of premises known as Lot No. 2950, Taman Tun Dr. Ismail 60000 Kuala Lumpur ("the demised premises"). A writ of distress was issued on 16 May 1989 and it was executed by the bailiff of this Court on 24 May 1989.

On 30 June 1989, Park East Holdings (M) Sdn. Bhd., together with one Sya Lieng Siew, who purported to sue for and on behalf of Kelab Damansara Westpoint ("the Westpoint Club"), and two others, applied by way of summon-in-chambers (see Encl. 4 of the Court file civil suit S7-22-5-78) for *inter alia* an injunction to restrain UDA from taking any further step in the execution of the writ of distress on the ground that among the goods that were distrained were goods allegedly owned by them. The application came on for hearing on 3 July 1989 and by consent the auction of the distrained goods was stayed upon the payment of a sum of RM10,000 by the applicants into Court as security for any damages that might be sustained by UDA as a result of the stay. The applicants were also given leave to apply under s. 10(1) of the Distress Act 1951 (Act 255) ("the Act") for the release of the goods claimed by the applicants.

On 4 July 1989, an application under s. 10(1) of the Act was accordingly made by Park East Holdings (M) Sdn. Bhd., (in receivership). In the meantime seven more claimants also applied for the release of the goods mentioned in their respective applications which they claimed were owned by them. I shall, however, deal firstly with the claim of Park East Holdings (M) Sdn. Bhd., (in receivership) ("Park East Holdings") as they are not only the main contestant in this proceeding but the other seven claims are largely hinged on the success or otherwise of the claim of Park East Holdings.

At the outset I should mention that at the hearing of this case Counsel for UDA had raised a preliminary objection contending that as the receiver and manager of Park East Holdings was improperly appointed, the said receiver and manager therefore had no *locus standi* to pursue the claim on behalf of first claimant. I had overruled his objection and I need not say anything more on that matter in this judgment as I shall be giving my grounds for my ruling (if required) separately. Another matter which I should mention is that in dealing with the claim of Park East Holdings, this Court will have to rely on the documentary evidence adduced by Park East Holdings comprising of two affidavits affirmed earlier by one Chung Sze Char and Sya Lieng Siew respectively and other contemporary correspondence and documents all of which are annexed to the affidavits affirmed by the representatives of the first claimant (see Encls. 33 and 45). As UDA did not file any affidavit to rebut or contradict the affidavits filed by the first claimant, any material allegations made in the said affidavits are deemed to have been admitted - see *Tynte v. Buller* [1854] 23 LJ Ch 504.

With this short preface I shall now proceed to deal with the claim. The indisputable or at least undisputable facts of this case are these. The demised premises was let to Syabas effective from 1 January 1986. An attempt was made on 24 May 1986 by Syabas to make Park East Holdings their nominee, as tenant of the demised premises. Apparently UDA refused

to accept the proposal for the tenancy agreement subsequently executed was in the names of Syabas and UDA. It is clear from the evidence that the purpose of renting the premises was to use it as a clubhouse for Westpoint Club and this was known to UDA (see the letters of UDA's representatives dated 4 March 1987 and 6 May 1987 respectively by which plans for the renovation or improvement of the demised premises were submitted to the appropriate authority in respect of the change of use of the demised premises). It is not clear when exactly was Westpoint Club established. There is, however, no doubt that the said club was established by Park East Holdings and it was established as a proprietory club. Everything in it was owned by Park East Holdings (see the memorandum of licence, rules and regulations of the said club). Park East Holdings also managed to get a licence in their name from Kementerian Kewangan to operate slot machines in the demised premises. The licence was issued to them on 9 September 1988. Recruitment of members was duly carried out and by 1989 there were 1300 members. In order to run the said club, Park East Holdings had to purchase all necessary furnitures, machines and equipments for the use and enjoyment of the club members. They had also spent a substantial amount of money in the region of over RM4 million to upgrade the demised premises in order to make it suitable for use as a clubhouse. There is no doubt that UDA knew or should have known of all the transactions carried out by Park East Holdings. It is also important to note that all the goods and chattels purchased for the use of the said club were bought by Park East Holdings either under their own name or under the name of Westpoint Club. Nothing was bought by Syabas or in the name of Syabas.

Now to the law. The question of whether Park East Holdings are entitled to the release of the goods has to be resolved on a proper construction of s. 10(1) particularly proviso (i) thereto and s. 12(a) of the Act. They are the focus of the arguments of the Counsel at the hearing.

Before construing the statutory provisions it is useful to say something regarding the legal principles advocated by the common law. It is clear that before the right to distrain for rent upon a demise may arise under the common law, the relation of landlord and tenant must exist, both when the rent become due and when the distress is levied and the rent must be in arrear. There must be a demise recognised by law or equity - see *Walsh v. Longsdale* [1882] 21 Ch D 9. If the relationship between the parties is not that of landlord and tenant but merely that of licensor and licensee, payment made for the use of the premises is not rent and no right to distrain is conferred on the licensor - see *Halbury's Laws of England* Vol. 13, 4th Edn., para 208. Another common law principle is that a landlord can *prima facie* seize and distrain for rent in arrear all goods and chattels found on the premises out of which the rent issues; the goods and chattels may be the property of the tenant or of a stranger, the landlord being entitled to have recourse of all the chattels actually on his tenant's premises without reference to their ownership - see *Lyons v. Elliot* [1867] 32 Cl. D. 437. However certain exceptions have been grafted upon the general rule, both by the common law and by statute in the interest of trade and public convenience - see *Gilman v. Elton* [1821] 129 ER CP 1211. Furthermore a landlord may by his own act or conduct be estopped from setting up a right to seize the property of a third person. Thus a landlord cannot distrain on the goods of a third person brought on the demised premises by the landlord himself or with his consent - see *Fowkes v. Joyce* Vol. 23 ER Ch 692. Also by his conduct, a landlord may be held to have waived his right of distress on a stranger's goods, an agreement not to distrain being implied from the circumstances where necessary - see *Cresswell v. Jefferey* [1912] 28 TLR 413. Finally it must also be noted that anyone claiming the benefit of one of

these exceptions must satisfy the Court that his case falls within it. The exceptions are stated in the form of rules and the Court will not travel beyond the definition of the exceptions prescribed - see *Clarke v. Millwall Dock Co.* [1886] 17 QBD 94.

Reverting to the provisions in the Act, s. 10(1) thereof, insofar as they are relevant to this case reads:

> 10(1) Where any movable property of:
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> (a) any under tenant;
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> (b) any lodger; or
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> (c) any other person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof,
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> has been seized under a warrant of distress issued to recover arrears of rent due to a superior landlord by his immediate tenant, such under tenant, lodger, or other person aforesaid may apply to a Judge to discharge or suspend the warrant, or to release a distrained article.

and the proviso (i) thereto reads:

> (i) ... no order shall be made unless such under tenant, lodger or other person aforesaid satisfies the Court that the immediate tenant has no right of property or beneficial interest in such furniture, goods or chattels and that such furniture, goods or chattels are the property or in the lawful possession of such under tenant, lodger or other person aforesaid.

It cannot be disputed that Park East Holdings are neither the "under tenant" nor "lodger" of Syabas for there is no evidence to show that they have entered into any sub-tenancy with Syabas, neither is there any evidence to show that they have paid any rentals to Syabas. At any rate if they were under tenants or lodgers one would expect UDA to invoke s. 14 of the Act to recover the rents owed to them by Syabas. However, whether they are the "any other person" within the ambit of s. 10(1)(a) is in issue. Counsel for UDA contends (if I understand him correctly) that since a landlord has an absolute right to distrain all goods found in his tenant's premises, it is idle for the claimant to say that the goods belonged to them for no act of a stranger can oust the right of a landlord to distrain. The learned Counsel also rested his submission on the doctrine of reputed owner. Counsel for the first claimant, on the other hand, says that as Park East Holdings have sufficiently proved that they are the owners of the goods in question and the same were in their possession at the material time, they have therefore satisfied all the requirements prescribed under s. 10(1) of the Act. They are therefore entitled to an order for the release of the said goods.

There is no doubt that Park East Holdings have, on the balance of probabilities, established that the goods in question are owned by them and that immediately prior to the execution of the writ of distress they were in the possession of the first claimant. I say this because all the goods in question were purchased by Park East Holdings either in their name or in the name of West Point Club which was established and managed and controlled by them. Furthermore at the material time the goods in question were always in the actual possession of Park East Holdings who as proprietor of Westpoint Club have not only the control and management of the said club and all its movable properties but also exclusive ownership of the same - see *Baird v. Wells* [1890] 44 Ch D 661.

The next question that has to be asked and answered is whether Syabas have any right of property or beneficial interest in the goods in question. In considering this point I can say at once that any proposition that Syabas are the owner of the goods must surely dehor the

evidence adduced in this case. Furthermore there is nothing here to show that the goods in question are held by Park East Holdings in trust for or as agent or servant of Syabas. Indeed they are not even holding the said goods in trust for the members of Westpoint Club! It has often been said in relation to chattels that possession is *prima facie* evidence of title. That being so, the onus of proof of title is on the execution creditor or as in this case the landlord - see *Mallal's Supreme Court Practice* by Tan Sri Chang Min Tat at p. 173. This UDA have failed to do. In any case at the risk of repeating myself, I must say that here the said club was established by Park East Holdings as a proprietory club and all the movable properties therein are not only exclusively owned by them but they were also under their exclusive possession at the material time. Now Park East Holdings being a company registered under the Companies Act 1965 is in the eyes of the law a separate legal entity (see *Solomon v. Solomon & Co.* [1895-1899] All ER Reprint p. 33. All the profits from Westpoint Club go to this company. Under these circumstances how can anyone say that Syabas have a beneficial interest in the goods in question? There is no apparent connection between Syabas and Westpoint Club.

I must however confess that at one stage I was perturbed over the matter of Park East Holdings having exclusive use of the demised premises which may well suggest that they would have a beneficial interest in the tenancy of the demised premises. After careful consideration I can now say that they do not have such an interest. They may have a beneficial occupation of or even a beneficial interest in the demised premises. That by itself does not necessarily mean that they must have any beneficial interest in the tenancy of the demised premises. They do not even have any equitable right or interest in the tenancy. In this connection it is to be noted that there is no evidence to show that Syabas have given up their power and dominion over the demised premises. The fact that Syabas were still paying the rentals of the demised premises right up to the early part of 1989 is compatible with their retaining the power and dominion of the said premises. I should, however, mention that in the statement of account of Park East Holdings for the year 1988 produced by their receiver and manager there is an entry stating "Rental of premises ... RM431,216.25 cents. I must admit that at one stage I thought that the rentals were paid in respect of the demised premises. Upon a careful examination of that statement of account I found another entry stating "upkeep of club premises ... RM115,008.78 cents. Comparing these two entries, one cannot say with any degree of certainty that the rental was paid in respect of the demised premises bearing in mind that the said statement of account is that of Park East Holdings and this company may well have undertakings housed in other premises in respect of which they have to pay rentals.

Turning now to the question of reputed owner, the relevant part of s. 12(a) of the Act reads:

> Section 10 shall not apply:
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> (a) to goods belonging to the husband or wife of the tenant whose rent is in arrear, or to goods comprised in any bill of sale, hire purchase agreement, or settlement made by such tenant, or to goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof.

Now, as I have found that the first claimant is a stranger *vis-a-vis* the distress proceedings, I do not think the provisions of the said s. 12(a) can have any relevance. If, however, I am wrong in arriving at this conclusion I would say that as UDA knew or should have known about the purchase of the goods in question by Park East Holdings and that the respective

true owners of the said goods had at all times been dealing with that company, there is no question of UDA being made to believe that the goods would have belonged to the tenant of the demised premises - see per judgment of Lord Selbourne in the case of *Re Coustun.*

Quite apart from what have been discussed above, I think that in the circumstances of this case, it is proper for me to draw the inference that UDA gave at least by implication consent to the delivery of the goods to the demised premises. Their acquiescence therefore precludes them from distraining the same - see *Fowkes v. Joyce* (*supra*).

The last matter to consider is whether the right of the debenture holders of Park East Holdings, namely Bolton Finance Bhd., can prevail when the execution of the writ of distress has been carried out but not yet completed since the goods seized have not yet been sold. It now seems quite clear that an execution creditor (or in this case a landlord who has obtained a writ of distress) may retain the benefit of his execution only if there has been both a seizure and sale of goods before the crystallisation of the floating charge given to a debenture holder. Now when the debenture holder takes step to enforce the floating charge (eg. by appointing a receiver) the floating charge crystallises into a specific charge and "attaches" on the assets of the company granting the debenture - see *Taunton v. Sheriff of Warwikleshire* [1895] 2 Ch 319. In the result the debenture will prevail since the security has become a specific one before the goods are sold - see *Haw Par Bro. International v. Overseas Textiles Co. Ltd.* [1978] 2 MLJ 19. On these authorities I hold that the debenture holders in this case namely Bolton Finance Bhd., take priority since the floating charge given under the debenture in question has crystallised before the execution of the writ of distress is completed.

Before I conclude I must say that in considering this case, I had noted that the majority shareholder and director of Syabas, Sya Lieng Siew, is also the member president of Westpoint Club. That being so, I thought that Park East Holdings might well be the alter ego of Syabas. However upon a closer scrutiny into the matter I do not think that it is proper for me to draw such an inference particularly when this Sya Lieng Siew is not even a shareholder of Park East Holdings. In performing his duties he is or should be answerable to Park East Holdings and not Syabas. I should also say that I strongly suspect that Syabas may have some connection with the Park East Holdings and the transactions carried out by the latter are not quite above board. However suspicion is not proof. Unless a fact is proved, no Judge has a right to look for conjecture let alone suspicion to support his findings.

For the above reasons judgment must be given to the first claimant.

Also found at [1990] 1 CLJ 805